



multi-platform marketing program to promote its products and stores.

4. Among those platforms used and targeted, are consumers' mobile cellular telephone devices to which Macy's sends Short Message Service ("SMS" or "Text") messages promoting sales, offers and Macy's services.

5. Defendant did not provide Plaintiffs clear and conspicuous disclosure of the consequence of providing it their phone number, *i.e.* that the Plaintiffs agreed unambiguously to receive automated texts messages from or on behalf of Defendant.

6. The telemarketing messages were sent to Plaintiffs' cell phones by or on behalf of Defendant using a fully automated system. The messages were unauthorized and not sent for emergency purposes. Accordingly, Defendant's messages violated the TCPA.

### **JURISDICTION**

7. This Court has original jurisdiction over this matter pursuant to 28 U.S.C. § 1331. *Mims v. Arrow Fin. Serv., LLC*, 132 S. Ct. 740, 751-53 (2012).

8. Venue is proper in this District pursuant to 28 U.S.C. § 1391, because Macy's resides in this District and because a substantial part of the events giving rise to the claim occurred in this District.

### **PARTIES**

9. Plaintiff Jeanette Kugel ("Ms. Kugel") is, and at all times mentioned herein was, an adult individual residing in Palm Beach Gardens, Florida, and is a "person" as defined by 47 U.S.C. § 153(39).

10. Plaintiff Janine Mahlstadt ("Ms. Mahlstadt") is, and at all times mentioned herein was, an adult individual residing in Shavertown, Pennsylvania, and is a "person" as defined by 47 U.S.C. § 153(39).

11. Plaintiff Eleanor Payne (“Ms. Payne”) is, and at all times mentioned herein was, an adult individual residing in Lancaster, California, and is a “person” as defined by 47 U.S.C. § 153(39).

12. Plaintiff Kimberly Pitcher (“Ms. Pitcher”) is, and at all times mentioned herein was, an adult individual residing in Costa Mesa, California, and is a “person” as defined by 47 U.S.C. § 153(39).

13. Plaintiff Vikramjeet Singh (“Mr. Singh”) is, and at all times mentioned herein was, an adult individual residing in Durham, North Carolina, and is a “person” as defined by 47 U.S.C. § 153(39).

14. Plaintiff Tiana Trader (“Ms. Trader”) is, and at all times mentioned herein was, an adult individual residing in Penns Grove, New Jersey, and is a “person” as defined by 47 U.S.C. § 153(39).

15. Plaintiff Annette Winter (“Ms. Winter”) is, and at all times mentioned herein was, an adult individual residing in Parsippany, New Jersey, and is a “person” as defined by 47 U.S.C. § 153(39).

16. Macy’s is a business entity with an address of 151 West 34<sup>th</sup> Street, New York, NY 10001, and is a “person” as defined by 47 U.S.C. § 153(39).

### **THE TCPA**

17. The TCPA regulates, among other things, the use of automated telephone dialing systems (“ATDS”).

18. Specifically, 47 U.S.C. § 227(1)(A)(iii) prohibits any call using an ATDS to a cellular phone without prior express consent by the person being called, unless the call is for emergency purposes.

19. 47 U.S.C. § 227(a)(1) defines an ATDS as equipment having the capacity–

(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and

(B) to dial such numbers.

20. “Prior express *written* consent” is required before making automated *telemarketing* calls, meaning there must be a written agreement, signed by the person receiving the call or text, with a “clear and conspicuous disclosure” that specifically authorizes the seller to send telemarketing communications using an automatic telephone dialing system or an artificial or prerecorded voice. 47 C.F.R. § 64.1200.

21. The FCC has clarified that text messages qualify as “calls” under the TCPA:

We affirm that under the TCPA, it is unlawful to make any call using an automatic telephone dialing system or an artificial or prerecorded message to any wireless telephone number. Both the statute and our rules prohibit these calls, with limited exceptions, “to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other common carrier service, or any service for which the party is charged.” This encompasses both voice calls and text calls to wireless numbers including, for example, short message service (SMS) calls, provided the call is made to a telephone number assigned to such service.

*In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd. 14014, 14115 (July 3, 2003); *see Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 953 (9th Cir. 2009).

## **FACTUAL ALLEGATIONS AS TO INDIVIDUAL PLAINTIFFS**

### **I. Jeanette Kugel**

22. In 2015, Macy’s began placing automated text messages to Ms. Kugel’s cellular telephone number, XXX-XXX-5105 (the “5105 Number”).

23. The messages were so called “Macy’s Promo Alerts” and set forth, for example:



24. The texts were telemarketing. They advertised sales and promotions available at Macy's retail stores and on its website.

25. Defendant placed the text messages from telephone number 62297, an abbreviated phone number known as an SMS short code licensed and operated by Macy's.

26. Defendant's first text message to Ms. Kugel was in immediate response to a text message that Ms. Kugel sent to 62297 seeking a specific promotion or coupon.

27. Thereafter, Defendant began sending Ms. Kugel unprompted, automated text messages offering additional, separate promotions.

28. Ms. Kugel continued to receive Defendant's automated text messages through February 24, 2016.

29. In total, Defendant sent Ms. Kugel at least eighty (80) text messages to the 5105 Number.

## **II. Janine Mahlstadt**

30. In or around 2013, Macy's began placing automated text messages to Ms. Mahlstadt's cellular telephone number, XXX-XXX-9696 (the "9696 Number").

31. The messages were the same so called "Macy's Promo Alerts" and set forth, for example:

●●○○ AT&T 3:11 PM 55%  
 < Messages 622-97 Contact

Text Message  
 Wed, Dec 23, 1:06 PM

Macy's Promo Alerts:  
 Hurry! Extra 20% off +  
 order online, pick up in  
 store by 12PM tomorrow:  
<http://mcys.co/1RkxRjn>  
 Details: <http://mcys.co/1QqQjGU> Txt STOP=End

Sat, Dec 26, 1:06 PM

Macy's Promo Alerts: Free  
 Shipping at \$25 + web  
 busters end tomorrow!  
 Shop our After Christmas  
 One Day Sale: <http://mcys.co/1IK76C6> Txt  
 STOP=End.

Mon, Dec 28, 1:06 PM

Macy's Promo Alerts: After

Text Message Send

●●○○ AT&T 3:11 PM 55%  
 < Messages 622-97 Contact

Sun, Jan 3, 1:38 PM

Macy's Promo Alerts:  
 Hooray for Super Sunday!  
 Take an extra 20% off  
 great picks now: <http://mcys.co/1kdfyya> Details:  
<http://mcys.co/1Ohbk4P>  
 Txt STOP=End.

Wed, Jan 6, 1:04 PM

Macy's Promo Alerts: Treat  
 yourself to 25%-75% off +  
 extra 15% off with code  
 SALE: <http://mcys.co/1NLs8Q7> Details: <http://mcys.co/1NLtsm0> Txt  
 STOP=End.

Sat, Jan 9, 1:36 PM

Macy's Promo Alerts: Ends  
 tomorrow extra 15% off +

Text Message Send

32. Defendant placed the text messages from number 62297, an abbreviated phone number known as an SMS short code licensed and operated by Macy's.

33. Defendant's first text message to Ms. Mahlstadt was in immediate response to a text message that Ms. Mahlstadt sent to 62297 seeking a specific promotion or coupon.

34. Thereafter, Defendant began sending Ms. Mahlstadt unprompted, automated text messages offering additional, separate promotions.

35. Ms. Mahlstadt continued to receive Defendant's automated text messages through February of 2016.

36. In total, Defendant sent Ms. Mahlstadt several dozen text messages to the 9696 Number.

### **III. Eleanor Payne**

37. In or around 2015, Macy's began placing automated text messages to Ms. Payne's cellular telephone number, XXX-XXX-6743 (the "6743 Number").

38. The messages were the same so called "Macy's Promo Alerts" described above.

39. Upon information and belief, Defendant obtained the 6743 Number when one of its employees asked Ms. Payne for her telephone number at a retail location.

40. Defendant placed the text messages from number 62297, an abbreviated phone number known as an SMS short code licensed and operated by Macy's.

41. Defendant began sending Ms. Payne unprompted, automated text messages offering promotions and coupons at its retail locations.

42. Ms. Payne continued to receive Defendant's automated text messages through March of 2016.

43. In total, Defendant sent Ms. Payne approximately two dozen text messages to the



6743 Number.

**IV. Kimberly Pitcher**

44. In 2015, Macy's began placing automated text messages to Ms. Pitcher's cellular telephone number, XXX-XXX-7631 (the "7631 Number").

45. The messages were the same so called "Macy's Promo Alerts" described above.

46. Defendant placed the text messages from telephone number 62297, an abbreviated phone number known as an SMS short code licensed and operated by Macy's.

47. Defendant sent Ms. Pitcher unprompted, automated text messages offering promotions and coupons at its retail locations.

48. Ms. Pitcher continued to receive Defendant's automated text messages through March of 2016.

49. In total, Defendant sent approximately four (4) text messages per week to the 7631Number.

**V. Vikramjeet Singh**

50. On or around August 29, 2014, Macy's began placing automated text messages to Mr. Singh's cellular telephone number, XXX-XXX-3575 (the "3575 Number").

51. The messages were the same so called "Macy's Promo Alerts" described above.

52. Defendant placed the text messages from number 62297, an abbreviated phone number known as an SMS short code licensed and operated by Macy's.

53. Defendant's first text message to Mr. Singh was in immediate response to a text message that Mr. Singh sent to 62297 in order to receive a coupon as part of an advertised promotion.

54. Thereafter, Defendant began sending Mr. Singh unprompted, automated text

messages offering additional, separate promotions.

55. Mr. Singh continued to receive Defendant's automated text messages through May of 2015.

56. In total, Defendant sent Mr. Singh at least forty-five (45) text messages to the 3575 Number.

#### **VI. Tiana Trader**

57. In or around 2014, Macy's began placing automated text messages to Ms. Trader's cellular telephone number, XXX-XXX-9670 (the "9670 Number").

58. The messages were the same so called "Macy's Promo Alerts" described above.

59. Defendant placed the text messages from number 62297, an abbreviated phone number known as an SMS short code licensed and operated by Macy's.

60. Defendant's first text message to Ms. Trader was in immediate response to a text message that Ms. Trader sent to 62297 seeking a specific promotion or coupon.

61. Thereafter, Defendant began sending Ms. Trader unprompted, automated text messages offering additional, separate promotions.

62. Ms. Trader continued to receive Defendant's automated text messages through February of 2016.

63. In total, Defendant sent Ms. Trader dozens of text messages to the 9670 Number.

#### **VII. Annette Winter**

64. In or around 2015, Macy's began placing automated text messages to Ms. Winter's cellular telephone number, XXX-XXX-8449 (the "8449 Number").

65. The messages were the same so called "Macy's Promo Alerts" described above.

66. Defendant placed the text messages from number 62297, an abbreviated phone

number known as an SMS short code licensed and operated by Macy's.

67. Defendant's first text message to Ms. Winter was in immediate response to a text message that Ms. Winter sent to 62297 seeking a specific promotion or coupon.

68. Thereafter, Defendant began sending Ms. Winter unprompted, automated text messages offering additional, separate promotions.

69. Ms. Winter continued to receive Defendant's automated text messages through February of 2016.

70. In total, Defendant sent Ms. Winter at least forty-three (43) text messages to the 8449 Number.

#### **FACTUAL ALLEGATIONS AS TO ALL PLAINTIFFS**

71. Defendant's text messages received by Plaintiffs were fully automated. The content of the messages received by Plaintiffs was not individualized to any of the Plaintiffs in any way. The exact same text messages were automatically sent to thousands of consumers as a part of Defendant's pre-planned telemarketing campaign.

72. The text messages sent to Plaintiffs' cellular phone by Macy's advertised the availability of Defendant's products and services and thus constitute 'telemarketing.'

73. Any text messages that Plaintiffs sent to Defendant did not provide Defendant prior express written consent to send Plaintiff automated calls as required by the TCPA. Plaintiffs were not given clear and conspicuous disclosure that they were consenting to receive fully automated text messages to their respective cellular phones.

74. The text messages sent to Plaintiffs' cellular phones were made with an ATDS as defined by 47 U.S.C. § 227(a)(1). The ATDS has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator.

75. The telephone numbers messaged by Defendant were assigned to a cellular telephone service for which Plaintiffs incur charges for incoming messages pursuant to 47 U.S.C. § 227(b)(1).

76. The messages from Defendant to Plaintiffs were not placed for “emergency purposes” as defined by 47 U.S.C. § 227(b)(1)(A)(i).

### **COUNT I**

#### **Violations of the Telephone Consumer Protection Act,**

#### **47 U.S.C. § 227, et seq.**

77. Plaintiffs repeat and reallege the above paragraphs of this Complaint and incorporate them herein by reference.

78. Defendant sent multiple automated text messages to cellular numbers belonging to Plaintiffs without their prior express written consent.

79. Each of the aforementioned messages by Defendant constitutes a violation of the TCPA.

80. Plaintiffs are entitled to an award of \$500.00 in statutory damages for each message sent in violation of the TCPA pursuant to 47 U.S.C. § 227(b)(3)(B).

### **COUNT II**

#### **Knowing and/or Willful Violations of the Telephone Consumer Protection Act,**

#### **47 U.S.C. § 227, et seq.**

81. Plaintiffs repeat and reallege the above paragraphs of this Complaint and incorporate them herein by reference.

82. Defendant knowingly and/or willfully sent multiple automated text messages to a cellular numbers belonging to Plaintiffs without their prior express consent.

83. Each of the aforementioned messages by Defendant constitutes a knowing and/or willful violation of the TCPA.

84. As a result of Defendant's knowing and/or willful violations of the TCPA, Plaintiffs are entitled to an award of treble damages up to \$1,500.00 for each call in violation of the TCPA pursuant to 47 U.S.C. § 227(b)(3)(B) and 47 U.S.C. § 227(b)(3)(C).

**7322-PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs pray that the Court grant Plaintiff and the Class the following relief against Defendant as follows:

1. Statutory damages of \$500.00 for each and every call in violation of the TCPA pursuant to 47 U.S.C. § 227(b)(3)(B);
2. Treble damages of up to \$1,500.00 for each and every call in violation of the TCPA pursuant to 47 U.S.C. § 227(b)(3)(C);
3. An award of attorneys' fees and costs to counsel for Plaintiff; and
4. Such other relief as the Court deems just and proper.

**TRIAL BY JURY DEMANDED ON ALL COUNTS**

Dated: April 7, 2016

Respectfully submitted,

By /s/ Sergei Lemberg

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